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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JANE MARGURITE DOROTIK,

Defendant and Appellant.

D038706

(Super. Ct. No. SCN109628)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

Jane Margurite Dorotik was convicted of first degree murder and was sentenced to a term of 25 years to life. She appeals, arguing the trial court erred in refusing to instruct concerning the lesser included offense of voluntary manslaughter and that the evidence was insufficient to support a finding of malice aforethought or premeditation and deliberation.

FACTS

In February 2000 appellant and her husband Robert Dorotik (Robert) were living on a ranch they rented in a rural area near Escondido. The pair had three adult children. Appellant and Robert frequently argued about money. Appellant and daughter Claire were horse enthusiasts. Robert disapproved of the money spent by appellant to support that interest. The couple was not particularly affectionate, sometimes discussed divorce but never had a physical confrontation.

In 1997 appellant and Robert separated. Robert filed for divorce and sought spousal support from appellant whose employment was considerably more remunerative. The couple reconciled in 1998 and resided together at the ranch, agreeing to keep their finances separate. Their relationship was uneven and at times they argued. Robert started a business but it did not do well.

On the evening of February 13, 2000, appellant called friends and asked if they had seen Robert. Appellant explained Robert had gone for a run at 1:00 p.m. and had not returned. Appellant called the sheriff and reported Robert missing. A search was undertaken. The next day a sweatshirt, which appellant stated Robert was wearing on his run, was found on a road about two miles from appellant's home. Shortly thereafter, Robert's body was found in brush next to a road about a half mile from where the sweatshirt was located. Appellant was notified. She started to cry and asked if her husband had suffered.

It was determined that Robert died from blunt force injuries to the head, with ligature strangulation as a contributing factor. He suffered at least three blows to the

head. He had two large lacerations at the right side and back of the head with skull fractures underneath those lacerations and direct damage to the brain at the back of the head. There was a depressed skull fracture on the right side of the head. In the back of the head the bone was completely displaced and there was a hole in the skull. Robert had abrasions on his face and a ligature mark on his neck. There were abrasions and contusions on his hands that appeared to be defensive wounds. Robert was alive when strangled. An expert concluded the damage to Robert's head was consistent with hammer strikes.

The police interviewed appellant on February 13, 2000. She told the officers that about 1:00 p.m. Robert told her he was going to jog. She went to the barn and did not see him leave. When she returned to the house at 4:00 p.m., Robert was not there. When he had not returned by 5:00 p.m., she went out looking but could not find him. She then called the police. Appellant told the officers she and Robert each had a \$250,000 life insurance policy with the other as beneficiary.

A search was conducted of appellant's residence. Bloodstains were found in several areas in the master bedroom. The patterning of some of the stains was consistent with a beating occurring in the room. When officers turned over the mattress in the room, they found a large-volume bloodstain near the headboard. There was a folded, bloodstained towel between the mattress and box springs. In a bag in the master bedroom the officers found a syringe containing a horse tranquilizer. A bloody fingerprint was found on one of the syringes. The print was identified as appellant's. A bed sheet was found in a hamper with transfer, drip and impact blood spatters on it. A steam shampooer

and cleaning supplies were found in a living room closet. Blood was found on the handle, cap and nozzle of one of the bottles. Bloodstains were also found in the bed of a truck used at the ranch. DNA testing indicated many of these bloodstains were consistent with Robert's blood.

An expert in bloodstain patterning opined that the events started on the bed in the master bedroom. Robert was struck at least twice and perhaps a third time on the bed. He remained on the bed for a time after the assault. At some point Robert moved or was moved to another area in the bedroom where he was struck at least once more. Robert remained in that area for some time.

The expert also examined the clothes from Robert's body. There were transfer but no spatter stains on his T-shirt. There was no blood on his sweatpants. There were two bloodstains and a large amount of feces on Robert's boxer shorts. There was no blood on his shoes.

Appellant did not testify. She offered evidence suggesting that someone else killed Robert.

DISCUSSION

Appellant argues the evidence was insufficient to prove malice aforethought and premeditation and deliberation. In a related argument she contends the trial court erred in refusing to instruct concerning the lesser included offense of voluntary manslaughter.

A. Instructions on Voluntary Manslaughter

Appellant argues the trial court erred in denying her request for an instruction on the lesser included offense of voluntary manslaughter.

At the instructions conference, appellant, without reference to any specific facts, stated that the evidence would reasonably allow the conclusion the killing was the result of a "sudden eruption of emotions, emotions that clouded one's ability to form the necessary mental state required for murder" and that instructions should, therefore, be given on voluntary manslaughter. The trial court stated the only conceivable form of voluntary manslaughter applicable was that based on heat of passion and denied the requested instruction finding no evidence to support that theory.

Citing *Mullaney v. Wilbur* (1975) 421 U.S. 684, appellant argues this was error since in every murder trial the prosecution must always prove the absence of heat of passion. Appellant is incorrect. *Mullaney* was a murder case in which the issue of heat of passion was clearly raised by the evidence and argued by the defense. The jury was instructed that if it found the killing was intentional and unlawful, malice aforethought was conclusively presumed unless the defendant proved by a preponderance of evidence that he acted in the heat of passion on sudden provocation. (*Id.* at p. 686.)

The Supreme Court found such instruction constitutional error and stated: "We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is *properly presented* in a homicide case." (*Mullaney v. Wilbu, supra*, 421 U.S. at p. 704, italics added.)

Mullaney does not require that in every homicide case the prosecution prove the absence of heat of passion. The prosecution is required to do so only when the issue is "properly presented." In *People v. Rios* (2000) 23 Cal.4th 450 the court, citing *Mullaney*,

stated the issue of heat of passion is properly presented when prosecution evidence suggests that the killing may have been provoked or when the defense makes a showing of provocation. (*Id.* at pp. 461-462.)

To require an instruction on a lesser offense there must be evidence substantial enough to merit consideration by the jury. " ' "Substantial evidence' . . . is " 'evidence from which a jury composed of reasonable [persons] could conclude[]' " *that the lesser offense, but not the greater*, was committed. {Citations.}] [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 366-367.)

There was no substantial evidence in this case requiring an instruction on voluntary manslaughter based on provocation and heat of passion. Voluntary manslaughter has specific and relatively complex elements. In the context of this case voluntary manslaughter is an intentional, unlawful homicide upon a sudden quarrel or heat of passion if the killer's reason was actually obscured as the result of a strong passion aroused by a provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than judgment. No specific type of provocation is required, and the passion aroused need not be anger or rage but can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. Thus, a person who intentionally kills as a result of provocation, that is upon a sudden quarrel or heat of passion, lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

Appellant's attempt on appeal to demonstrate substantial evidence of provocation and heat of passion is unavailing. She notes evidence of her peaceful character, of Robert's difficulties with anger management, his occasional verbal humiliation of appellant, the brutality of the killing and the lack of an apparent motive. Such evidence at best allows speculation that appellant killed Robert out of anger. It is, however, not substantial evidence of provocation and heat of passion. The trial court properly denied appellant's request for instructions on voluntary manslaughter.

B. Sufficiency of the Evidence

Appellant argues the prosecution failed to offer evidence that either directly or by reasonable inference supported a finding of premeditated and deliberated murder. She further argues the evidence was insufficient to support a finding of malice aforethought since she contends the prosecution failed to meet its burden of proving an absence of heat of passion.

In determining whether the evidence is sufficient to support the verdict, we review the entire record viewing the evidence in the light most favorable to the judgment and presuming in support of the verdict the existence of every fact the jury could reasonably deduce from the evidence. The issue is whether the record so viewed discloses evidence that is reasonable, credible and of solid value such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.)

As noted above, we conclude the prosecution in this case had no burden of proving a lack of heat of passion and, therefore, no issue as cast by appellant arises concerning the sufficiency of evidence supporting a finding of malice aforethought.

Appellant's argument concerning the sufficiency of evidence to support a finding of premeditation and deliberation is less easily resolved. CALJIC No. 8.20 is a correct statement of the concept of premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) The instruction defines "deliberate" to mean "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." "Premeditated" means "considered beforehand."

To be first degree murder the killing must be "preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." (CALJIC. No. 8.20.)

However, "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberated and premeditated. The time will vary with different individuals and under varying circumstances." (CALJIC. No. 8.20.)

The test is not the "duration of time, rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not

deliberation and premeditation as will fix an unlawful killing as murder in the first degree." (CALJIC. No. 8.20.)

"To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and having in mind the consequences she decides to and does kill." (CALJIC. No. 8.20.)

In determining whether sufficient evidence supports a verdict of first degree murder, we look generally for evidence of planning activity, motive to kill and the manner of killing. There is, however, no formula or particular combination of these factors necessary for a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080-1082; *People v. Perez, supra*, 2 Cal.4th at pp. 1124-1126.)

The Attorney General argues the evidence showed planning, a motive to kill and manner of killing supportive of a finding of first degree murder. As to planning, the People assert that the presence of two weapons, i.e., a rope and a hammer, allows the inference that at least one of the weapons was ready in the bedroom in anticipation of the killing. The Attorney General also finds evidence of planning in the absence of Claire from the home at the time of the killing and the fact she would not return for a lengthy period. We conclude these factors suggest little about planning. It is mere speculation that one or more of the weapons was in the bedroom in anticipation of killing Robert and Claire's absence could be mere happenstance.

The Attorney General finds evidence of motive in appellant and Robert's troubled marriage, in their financial disagreements and in appellant's desire for financial independence. The People note a divorce would in all probability have led to appellant

paying Robert spousal support. In addition, the proceeds of his life insurance policy would have been a financial windfall and done much to advance appellant's life plans.

While there is some generic evidence of motive in this case, it is not the particular and specific kind that would, on its own, strongly support a conclusion that a murder was premeditated and deliberated.

The crucial evidence of appellant's state of mind in murdering Robert is the manner of killing. In reviewing that evidence it is important to remember that detailed and meaningful planning is not an element of premeditation and deliberation. The question rather is whether the evidence supports a finding of "pre-existing reflection," whether evidence suggests a weighing and considering of the consequences in deciding to kill.

The hammer blows to Robert's head were all to the back and side. The assault began while Robert was on the bed in the master bedroom. Such evidence strongly suggests that Robert was not aware of a pending attack, that he was in a position of particular vulnerability and relative defenselessness. An attack of this deadly sort on a person in such a position allows the conclusion that the assault was not an act of impulse but was calculated. After the assault Robert was on the bed bleeding for some period of time. He was later moved or he moved to another position in the bedroom where he was again struck in the back or side of the head. At some point while still alive Robert was strangled. The use of multiple blows to the head over a period of time and in different locations evidences not only an intent to kill but time to reflect and consider. This conclusion is made stronger by the use of multiple weapons.

We conclude that a rational trier of fact could find elements of premeditated murder beyond a reasonable doubt.

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.